(1) 89-1274

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT A. ALBERT, RICHARD W. PALIZAY, and SAMUEL R. SCHAFFER, on behalf of themselves and all other similarly situated,

Petitioners,

vs.

AVERY, INC., a Delaware Corporation; NELSON PELTZ and PETER MAY, as Officers and Directors; UNIROYAL CHEMICAL HOLDING CO., a Delaware Corporation; UNIROYAL CHEMICAL ACQUISITION CO., a New Jersey Corporation; UNIROYAL CHEMICAL CO., INC., a New Jersey Corporation; UCC INVESTORS HOLDING, INC., a Delaware Corporation; ROBERT J. MAZAIKA, as Officer and Director; and DREXEL BURNHAM LAMBERT INCORPORATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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129 pp

QUESTIONS PRESENTED

Whether a state cause of action brought by creditors of a corporation alleging that a proposed leveraged buyout of the corporation is a fraudulent conveyance is preempted by ERISA § 514 merely because the debt owed the creditors is retirement benefits.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as appear in the caption.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. -

ROBERT A. ALBERT, RICHARD W. PALIZAY, and SAMUEL R. SCHAFFER, on behalf of themselves and all other similarly situated,

Petitioners,

v.

AVERY, INC., a Delaware Corporation; NELSON PELTZ and PETER MAY, as Officers and Directors; UNIROYAL CHEMICAL HOLDING CO., a Delaware Corporation; UNIROYAL CHEMICAL ACQUISITION CO., a New Jersey Corporation; UNIROYAL CHEMICAL CO., INC., a New Jersey Corporation; UCC INVESTORS HOLDING, INC., a Delaware Corporation; ROBERT J. MAZAIKA, as Officer and Director; and DREXEL BURNHAM LAMBERT INCORPORATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CITATIONS OF THE OPINIONS BELOW

Albert v. Avery, Inc., 724 F. Supp. 245 (S.D.N.Y. 1989). The Decision of the Court of Appeals has not been officially or unofficially reported.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the District Court was entered on November 14, 1989. Jurisdiction of this Court is conferred by 28 U.S.C. §§ 1254(a) and 2106.

STATUTES INVOLVED

ERISA § 514(a), 29 U.S.C. § 1144(a):

> **"(a) Supersedure; effective date**
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975."

New York Debtor and Creditor Law § 279:[1]

"Right of Creditors whose claims have not matured

> Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,
>
> a. Restrain the defendant from disposing of his property,
> b. Appoint a receiver to take charge of the property,
> c. Set aside the conveyance or annul the obligation, or
> d. Make any order which the circumstances of the case may require."

STATEMENT OF THE CASE

Nature of the Complaint

This action was originally brought in the New York State Supreme Court by a class of active and

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[1] This statute is identical to Section 10 of the Uniform Fraudulent Conveyance Act, 9 Uniform Laws Annotated.

retired employees to enjoin the leveraged buyout[2] of their employer, the Uniroyal Chemical Co. ("Uniroyal Chemical"), by a group of management investors led by Defendant Robert Mazaika, Uniroyal Chemical's president. Mazaika and other members of Uniroyal Chemical management are also promoters of defendant UCC Investors Holding, Inc. ("UCC Investors"), a holding company formed with defendant Drexel Burnham Lambert, Inc. ("Drexel") to purchase Uniroyal Chemical

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2 "Leveraged buyout" is a popular term for a purchase financed principally by debt rather than equity investment. For discussion of the application to such transactions of fraudulent conveyance law, *see generally*, *Kupetz v. Wolf*, 845 F.2d 842, 845-7 (9th Cir. 1988); *United States v. Tabor Court Realty Co.*, 803 F.2d 1288, 1292, 1297 (3d Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987).

from its sole owner, defendant Avery, Inc. ("Avery").[3] The Complaint alleged that the proposed leveraged buyout was a fraudulent conveyance under the New York State Debtor and Creditor Law (which enacts the Uniform Fraudulent Conveyance Act), and breached the duties of Mazaika and other officers of Uniroyal Chemical under state corporation law.[4]

The Plaintiffs are long-time Uniroyal Chemical employees and retirees who are owed promised compensation in the form of pensions and retirement health and life insurance. The Plaintiffs alleged that the proposed sale of Uniroyal Chemical was a way for Avery

---

[3] Avery owned Uniroyal Chemical through two layers of subsidiary holding companies, Uniroyal Chemical Holding Co. ("UCHC"), and Uniroyal Chemical Acquisition Corp. ("UCAC"). The buyout of Uniroyal Chemical was structured as a purchase of UCHC. Since this is not germane to the issues here presented, it is disregarded in the summary that follows and Avery, UCHC and UCAC are generally treated together.

[4] The Complaint is set forth at A-58 - A-84.

to bail out of imminent bankruptcy caused by indebtedness incurred to finance Avery's own purchase of Uniroyal Chemical in 1986. Avery had proved unable to make required payments on this debt, was already in technical default, and explicitly threatened to file for bankruptcy protection if the buyout by UCC Investors was not consummated. To obtain the price it sought to discharge its own debts, Avery agreed to pay Mazaika and the other management investors (Uniroyal Chemical's top executives) a $6.6 million "incentive" for paying a purchase price (including the assumption of Avery debt) at least $100 million dollars above Uniroyal Chemical's market value.

By Avery's own account, the best arms-length offer which it obtained for Uniroyal Chemical, during an auction that Avery conducted for over a year, was only $700 million, insufficient for Avery to discharge its

own debts. To avoid the losses which bankruptcy would have caused its principal shareholders (Defendants Nelson Peltz and Peter May), Avery offered Mazaika and the other promoters of UCC Investors personal "incentive pay" if UCC Investors paid at least $800 million (including the assumption of Avery debt) for Uniroyal Chemical. Plaintiffs alleged that by investing their $6.6 million "incentive pay," and little or nothing else, in UCC Investors, the management group in effect would wind up with a free 25% equity interest in Uniroyal Chemical, UCC Investors' sole asset.

Plaintiffs alleged that the effect of the leveraged buyout was to move all Avery's debt obligations (previously not secured by or endangering Uniroyal Chemical assets), plus new debt to pay for Avery's profit and transaction fees, onto Uniroyal Chemical, burdening it

with enormous new debt, with no significant consideration and little or no new equity brought into Uniroyal Chemical. Uniroyal Chemical emerged mortgaged for virtually the full $800 million purchase price, including debt previously owed by Avery, even though Uniroyal Chemical's market value (as shown by Avery's unsuccessful efforts to sell it to an arms-length buyer) was at most $700 million. Yet, Uniroyal Chemical emerged with at most $15 million in new equity, leaving it severely undercapitalized and insolvent, and gravely threatening its ability to pay future unmatured debts such as those owed to the Plaintiffs.

Plaintiffs alleged that despite the inflated price and Uniroyal Chemical's resulting undercapitalization (which its officers had a fiduciary duty under state law to prevent), the sale is personally advantageous to Mazaika and the other management investors because

of the "incentive pay" which they received for selling the company to themselves. For paying the inflated price required by Avery, these investors essentially received a large, even though speculative, ownership interest in Uniroyal Chemical at no personal risk. In addition, Drexel, which had arranged financing for Avery's original purchase of Uniroyal Chemical, postponed the difficulties it would face if Avery defaulted on debt payments to Drexel's other clients. Mazaika and the other management investors, overcome by their own self interest, joined with Drexel and Avery to sacrifice the interests of Uniroyal Chemical and its creditors, and agreed to the highly inflated purchase price for their personal gain, without any consideration to Uniroyal Chemical, and to the extreme detriment of Uniroyal Chemical's unmatured creditors such as the Plaintiffs.

Plaintiffs alleged that the whole transaction constitutes a glaring fraudulent conveyance, a breach of corporate officers' duty of care and loyalty, and a waste of corporate assets, which violated, should have been enjoined, and should be set aside under state law.

Basis of State Court Jurisdiction

Counts One and Two of the Complaint allege a fraudulent conveyance under the Uniform Fraudulent Conveyance Act, enacted by the State of New York as Sections 270 to 281 of the Debtor and Creditor Law, and a similar New Jersey statute. Counts Three and Four allege a breach of corporate officers' and directors' fiduciary duties and corporate waste, also under state law. Count Five is an equitable claim to prevent unjust enrichment.

Removal to Federal Court

Defendants alleged in their Notice of Removal that:

> "All of the rights sought to be secured to the plaintiffs by this action including, *inter alia*, "all unfunded retirement obligations owed to the class" (Complaint at 15), relate to an employee benefit plan and therefore fall under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* Jurisdiction is therefore appropriate pursuant to 28 U.S.C. § 1331. *See, e.g., Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)." [A-89].

In reality, no claim in this case relates to, falls under or is governed by ERISA or any other federal law. Plaintiffs sought an injunction against the sale not under ERISA but under New York Debtor and Creditor Law § 279, which specifically empowers courts

to enjoin or set aside all fraudulent conveyances, and which specifically applies to unmatured, unliquidated and contingent (as well as other) debts.[5] No benefit plan is a party or affected by the action. The individual defendants are sued as corporate officers and directors, not as plan fiduciaries. *Cf. Hartle v. Packard Electric Co.*, 877 F.2d 354 (5th Cir. 1989); *Cuoco v. Nynex, Inc.*, 722 F. Supp. 884 (D. Mass. 1989).

Nevertheless, Defendants removed the action to federal court under 28 U.S.C. § 1441 and then moved to dismiss it, making the contradictory arguments that: (1) ERISA confers federal court jurisdiction over the Complaint, and (2) the court must dismiss the Complaint for lack of jurisdiction since it includes only state law claims and no remedy is available under ERISA.

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[5] Debtor and Creditor Law § 270, corresponding to Section 1 of the Uniform Fraudulent Conveyance Act.

Decision of the District Court Denying Remand

Judge Sand denied Plaintiffs' motion to remand on September 18, 1989 [A-1]. Plaintiffs requested reconsideration of the remand decision on September 27, 1989. On October 10, 1989, Judge Sand denied Plaintiffs' request for reconsideration and also denied their request for an injunction, and granted Defendants' motion to dismiss [A-16]. Plaintiffs appealed from both the September 18th and October 10th decisions in which Judge Sand held that the Complaint was preempted by ERISA and that the action was therefore removable under 28 U.S.C. § 1441(a).

Decision of the Second Circuit

On October 17, 1989, a panel of the Second Circuit, following oral argument, granted an expedited appeal from Judge Sand's rulings. Argument before a

different panel was held on October 25, 1989. On November 17, 1989, the second panel affirmed Judge Sand's ruling that the cause of action was preempted and the case was properly removed under 28 U.S.C. § 1441(a) [A-47].

ARGUMENT

A WRIT OF CERTIORARI SHOULD BE ALLOWED

A. The Decision of the Second Circuit is in Conflict With Decisions of Other Circuits and of State Courts of Last Resort.

The holding that state fraudulent conveyance law is preempted by ERISA and that a state cause of action brought in state court may be removed to federal court under ERISA § 514 is in conflict with holdings of the Third, Sixth, Seventh, and Ninth Circuits and of two state courts of last resort, the New York Court of Appeals and the Wisconsin Supreme Court.

State Courts of Last Resort

The New York Court of Appeals has ruled that the New York Debtor and Creditor Law, the statute under which this suit was brought, is not preempted by ERISA. *Planned Consumer Marketing, Inc. v. Coats and Clark, Inc.*, 71 N.Y.2d 442, 527 N.Y.S.2d 185, 522 N.E.2d 30 (1988). Authorizing a suit alleging a fraudulent conveyance to an employee benefit plan, the Court held: "ERISA does not preempt vindication of those state laws whose purpose is to inhibit the transfer of money in defraud of creditors, not to assess or regulate employee benefit plans." Similarly, in *Sasso v. Vachris*, 66 N.Y.2d 28, 494 N.Y.S.2d 856, 484 N.E.2d 1359 (1985), the Court of Appeals held that ERISA does not preempt a state cause of action to recover unpaid fund contributions as well as other debts to employees from a corporations' largest share-

holders, since this state remedy relates to the collectability of corporate debts and does not regulate employee benefits or otherwise relate to employee benefit plans.

The Wisconsin Supreme Court, that state's court of last resort, has also recently held that a state fraudulent conveyance claim by employee creditors against the leveraged buyout of their employer is not preempted by federal law, in that case § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. *Machinists Lodge 437 v. United States Can Co.*, 150 Misc. 2d 479, 441 N.W.2d 710 (1989), *pet. for cert. filed*, 1989 WL 125291 (Sept. 25, 1989) (No. 89-500). This Court has made clear that ERISA's preemptive force is coextensive with that of § 301; indeed, ERISA preemption analysis derives from that developed earlier under federal labor law. *Pilot Life Insurance Co. v.*

Dedeaux, 481 U.S. 58, 64-6 (1987); *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 41, 54-6 (1987). Thus, the Second Circuit's decision that ERISA preempts state fraudulent conveyance law conflicts with the holding of Wisconsin's as well as New York's court of last resort.

Circuit Courts of Appeals

The denial of remand in this case also conflicts with holdings from other federal Courts of Appeals in fraudulent conveyance and analogous cases. In *Railway Labor Executives Association v. Pittsburgh & Lake Erie Railroad Co.*, 858 F.2d 936, 939-43 (3d Cir. 1988), the court held that federal labor law (in that case, the Railway Labor Act) did not preempt employee creditors' claim that the leveraged buyout of their employer was a fraudulent conveyance under state law. In *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th

Cir. 1989), *pet. for cert. filed*, 1989 WL 113637 (Aug. 22, 1989) (No. 89-324), the court held that a state misrepresentation claim, alleging that an employer fraudulently induced employees to join an employee stock investment plan, was not preempted by ERISA. In *Air Line Pilots Association v. UAL Corp.*, 874 F.2d 439, 445-7 (7th Cir. 1989), the court held, in the context of a leveraged buyout, that federal labor law does not preempt state regulation of corporate takeovers. And in *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1404-5 (9th Cir. 1988), the court held that ERISA does not preempt a state claim for benefits owed an employee but lost as a result of tortious discharge.

In each of these cases, the court held, contrary to the Second Circuit in this case, that a state cause of action of general application is *not* preempted by

ERISA just because the debt owed by an employer is employee benefits.[6] Thus, the decision in this case conflicts with rulings of four other Circuits as well as two state courts of last resort. This Court should clarify the analysis of ERISA preemption which it undertook in *Dedeaux* and *Taylor*, *supra*.

B. The Decision of the Court of Appeals Below is in Conflict With Applicable Decisions of This Court.

In deciding that ERISA preempts remedies available to creditors under state fraudulent conveyance law, the Second Circuit has rendered a decision in direct conflict with this Court's recent decision in *Mackey v. Lanier Collections Agency & Service, Inc.*, 108 S. Ct. 2182 (1988). *Mackey* held that state

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[6] The Eighth Circuit, over a dissent from Chief Judge Lay, has explicitly disagreed with the Third Circuit's holding in *Pittsburgh and Lake Erie Railroad, supra*, underlining the division which can only be resolved by this Court. *Deford v. Soo Line Railroad Co.*, 867 F.2d 1080 (8th Cir. 1989), *cert. denied*, 109 S. Ct. 3265 (1989).

procedural remedies for the enforcement of creditors' rights are not preempted by ERISA. New York Debtor and Creditor Law § 279, like the Georgia garnishment statute at issue in *Mackey*, is a "procedural mechanism for the enforcement of judgments" which "creates no new basis for relief, or any grounds for recovery." 108 S. Ct. 2182, 2188, n.10.[7] Since the Debtor and Creditor Law simply protects whatever creditors' rights already exist by assuring the availability of assets to meet future obligations, and does not create, regulate or "relate to" the underlying, substantive obligations, under *Mackey*, it is not preempted by ERISA.

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[7] Indeed, defendants-respondents admitted in their brief opposing remand that New York's Debtor and Creditor Law simply provides a collection mechanism, as follows: "Fraudulent conveyance law is simply an enforcement mechanism to secure creditors' rights." Memorandum of Law of Defendants UCC Investors Holding Inc., Robert J. Mazaika and Drexel Burnham Lambert Incorporated in Opposition to Plaintiffs' Motion to Remand, at 12.

That defendants' obligations to the plaintiffs, which plaintiffs allege defendants' actions will render nugatory, involve retirement benefits rather than some other promised debt is not sufficient to bring plaintiffs' complaint under ERISA. The cases of this Court cited by Defendants, *Dedeaux* and *Taylor*, *supra*, in no way support Defendants' claim that general state law procedural remedies which protect all kinds of creditors are either preempted or removable to federal court. *Dedeaux* and *Taylor* found that ERISA preempted allegations that claims for benefits were improperly processed by ERISA-governed plans: a wrong for which Congress established a specific remedy in § 502 of ERISA, 29 U.S.C. § 1132.

Here, by contrast, the Complaint has nothing to do with what benefits are owed by an ERISA-governed plan, whether benefit claims are being processed prop-

erly, what the level of contributions to a plan should be, whether fiduciaries of a plan have discharged their duties faithfully, or similar issues which ERISA regulates, for which it provides remedies, and which would indeed be preempted under *Taylor* and *Dedeaux*. Rather, the complaint deals with a classic concern of state law, namely whether a fraudulent conveyance will render unmatured debts uncollectable. *Mackey* establishes that such a claim is not preempted by ERISA.

C. The Court of Appeals Below Has Decided an Important Question Which Has Not Been But Should be Settled by This Court.

Lastly, but perhaps most importantly, the decision below involves a question of vital public concern which should be settled by this Court. The leveraged buyout craze of the 1980's has placed future retirement benefits of countless retirees in jeopardy. It has been

said that the problem of underfunded and failing employee benefit plans is the potential savings bank crisis of the 1990's. If undercapitalized companies are unable to meet their unfunded pension obligations, the Pension Benefit Guaranty Corporation, an already overburdened federal agency, will be called upon to insure these benefits, pursuant to Title IV of ERISA, 29 U.S.C. § 1301 *et seq.*, but may be unable to do so.[8]

The PBGC notified the District Court in this case that it is unable to police these corporate transactions to assure that future benefits are not placed in jeopardy by fraudulent conveyances. See A-92 - A-94.

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8 Katherine Utgoff, PBGC's Executive Director, in comments made before the Senate Finance Committee on January 26, 1989, stated that leverage buyouts may give shareholders an advantage over retirees and the PBGC. According to a report by the Bureau of National Affairs, 1989 Daily Labor Report 25, A-7 (02/08/89):

> "Utgoff said that LBOs elevate the claims of shareholders, normally the lowest priority creditors, above those of bondholders, retirees and the PBGC."

Indeed, the PBGC has also successfully asserted, in another case, that state fraudulent conveyance laws are not preempted by ERISA.

In *In re International Harvester Consolidated Litigation*, 681 F. Supp. 512 (N.D. Ill. 1988), the court directly held that a fraudulent conveyance claim (alleged in that case as the third, common-law count of the complaint of the Pension Benefit Guaranty Corp.) was not preempted, since "the situation which the PBGC alleges here, delegation of ERISA responsibilities through a sale to an entity incapable of meeting those responsibilities, is one which Congress simply did not anticipate when it drafted the statutory language." *Id.* at 524.

The Court should address this important issue to clarify that plan participants who are owed retirement benefits, like all other creditors, may avail themselves

of state fraudulent conveyance laws to prevent their employers from fraudulently stripping away assets and rendering future obligations unenforceable.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Dated: New York, New York
February 6, 1990

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT A. ALBERT, RICHARD W. PALIZAY, and SAMUEL R. SCHAFFER, on behalf of themselves and all other similarly situated,	:	89 Civ. 6083 (LBS)
Plaintiffs,	:	OPINION
-against-	:	
AVERY, INC., a Delaware Corporation; NELSON PELTZ and PETER MAY, as Officers and Directors; UNIROYAL CHEMICAL HOLDING CO., a Delaware Corporation; UNIROYAL CHEMICAL ACQUISITION CO., a New Jersey Corporation; UNIROYAL CHEMICAL CO., INC., a New Jersey Corporation; UCC INVESTORS HOLDING, INC., a Delaware Corporation; ROBERT J. MAZAIKA, as Officer and Director; and DREXEL BURNHAM LAMBERT INCORPORATED,	:	
Defendants.	:	

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RENDERED ORALLY
IN COURT ON
SEPTEMBER 18, 1989

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Oral Opinion Rendered in Open Court on September 18, 1989 (Open court)

THE COURT:

I find the question raised by this motion to be a close one and in many respects, at least in this Circuit and in this context, a matter of first impression.

Nevertheless, I do believe that after the very able oral argument and briefing, and the opportunity that I had to review the authorities, I am in a position to resolve the motion, * * *

and the following constitutes the order and opinion of the court:

This action was originally brought in state court by several present and former employees of Uniroyal Chemical Company to enjoin the sale of

Uniroyal Chemical. Plaintiffs allege that if the proposed sale is concluded, Uniroyal Chemical will "be seriously undercapitalized and overindebted and unable to meet its future obligations to the plaintiffs as they mature."

Plaintiffs' complaint asserts five causes of action, all arising under New York State law, for fraudulent conveyance, corporate fraudulent transfer, breach of fiduciary duty, corporate waste and unjust enrichment.

Plaintiffs seek an "order clarifying and enforcing their rights" and an injunction against the sale of Uniroyal Chemical "until such time as a fund is set aside to provide for all unfunded retirement obligations owed to the class"; the class being defined in the complaint as "all Uniroyal Chemical salaried employees who are eligible to retire under the Uniroyal Chemical Pension Plan . . . and all former salaried

employees of Uniroyal Chemical who retired on or after December 3, 1986 . . . plaintiffs characterize themselves in the complaint as creditors, although ERISA provides that funds need not be set aside to the extent plaintiffs seek in their complaint, and the pension plan in question allows amendment.

Defendants have moved this action to Federal District Court, pursuant to 28 U.S.C. §§ 1441 and 1446. Plaintiffs now ask by motion brought on by order to show cause that this court issue an order remanding this case to state court.

Under 28 U.S.C. § 1441, actions are removable to federal court if a Federal District Court would have had original jurisdiction over the controversy. In this case, defendants allege that this court has federal question jurisdiction over the suit under 28 U.S.C. § 1331, since "all of the rights sought to be secured to the plaintiffs by this action . . . relate

to an employee benefit plan and therefore fall under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C § 1001, et seq.

Thus, the issue before the court today is the question of ERISA preemption, an issue which has been the subject of much litigation. The long-settled law in federal court has been that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law -- that is generally known as the well-pleaded complaint rule.

However, the Supreme Court has recognized in Metropolitan Life Insurance v. Taylor, 481 U.S. 58, (1987), a corrolary to that rule, which has become known as the "complete preemption doctrine."

The complete preemption doctrine holds "Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." In such

cases "any complaint that comes within the scope of the federal cause of action [created under federal statute] necessarily arise under federal law" for purposes of removal based on federal question jurisdiction.

In Metropolitan Life, the Supreme Court held that the plaintiff's common law contract and tort claims were preempted by ERISA since they sought to recover benefits from a covered employee benefit plan and that the suit therefore was removable to federal court since Congress had so completely preempted the field.

This court must therefore decide whether the state law claims set forth in the complaint are preempted by ERISA. If they are preempted, it is clear from Metropolitan Life that removal to federal court is proper. If the state law causes of action are

not preempted, then I must grant the motion to remand.

There is no question but that counsel may cite cases which are close or relevant on their facts to the question before the court going in either direction; that is finding preemption or a lack of preemption.

The recent Second Circuit opinion in Aetna Life Insurance v. Borges, 869 F.2d 142 (1989) sets forth a solid framework for answering the question in this case and generally informs and guides the analysis which forms the basis of this opinion.

In that opinion, Judge Newman noted that while courts have recognized that state laws which "relate to" employee benefit plans had been preempted, Congress did not intend to preempt all state laws having any impact on such plans, no matter how small or inconsequential. The Aetna Life opinion summarizes which state laws have been held to be preempted by

ERISA and which have survived challenges on preemption grounds.

The opinion states at 146: "Generalizing from these cases, we find that laws that have been preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee. Those that have not been preempted are laws of general application -- often traditional exercises of state power or regulatory authority -- whose effect on ERISA plans is incidental."

ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. The statute does not mandate that employers provide any particular benefits. But for employers that do provide any particular benefits, ERISA imposes participation

funding and vesting requirements, 29 USC, 1051-1086, and sets various uniform standards, including rules concerning reporting disclosure and fiduciary responsibility.

The statute also contains an express preemption provision. Section 514(a) of ERISA provides that the statute "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan covered by the statute."

It is clear that whether or not a state law is preempted by federal law is to be decided by examining Congressional intent. The Supreme Court has examined the scope of ERISA preemption on several occasions. The Supreme Court has stated that "the express preemption provisions of ERISA are deliberately expansive and designed 'to establish pension plan regulation as exclusively a federal

concern.'" Pilot Life Insurance Company v. Dedeaux, 481 U.S. 41, 1987.

The court finds particularly applicable to the issue now before it the language of the court in Dedeaux with respect to the intent of Congress in enumerating remedies available in ERISA and in concluding that those remedies should be exclusive.

Justice O'Connor, writing for the court, said at 481 U.S. 54: "In sum, the detailed provisions of Section 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans."

"The policy choices reflected in the inclusion of certain remedies, and the exclusion of others under the federal scheme, would be completely undermined if ERISA-plan participants and

beneficiaries were free to obtain benefits under state law that Congress rejected in ERISA."

The court then goes on to quote from its earlier decision in Massachusetts Mutual Life Insurance Company versus Ruskin, 473 U.S. 134, where it wrote at 146: "The six carefully integrated civil enforcement provisions found in Section 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."

In other words, Congress decided in ERISA to create certain specific remedies so that an employer, contemplating adoption of a plan would know with reasonable precision what consequences ensued. Creation of additional remedies is a matter of considerable federal interest, especially where, as here, that remedy would subject the employer to second-guessing by ERISA participants and beneficiaries as to

the economic bona fides of a contemplated transaction not directly related to the plan itself.

After reviewing the authorities that I have already cited, and others called to my attention by counsel, I conclude that the state law causes of action alleged in the complaint in this case are preempted by ERISA.

Plaintiffs' prayer for relief asks for an injunction against the sale of Uniroyal Chemical "unless and until such time as a fund is set aside to provide for all unfunded retirement obligations owed to the class."

It is a matter of form and not of economic reality whether the reserve fund which plaintiffs would require is a fund administered by the ERISA fiduciary or not. The practical economic consequence of the relief sought by plaintiffs in this action is to require the employer, by virtue of the adoption of the ERISA plan, to create a reserve fund. Thus, plaintiffs are seeking to

use state law causes of action to require a company to fund its employee benefit plan in a manner not required by ERISA. ERISA itself clearly has its own regulations for the administration and funding of covered plans, (USC 1082), and has provided its own scheme for enforcement of those requirements.

Section 502(a) allows actions "to recover benefits due . . . under the terms of the plan . . . to enforce . . . rights under the terms of the plan"; "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" and "to obtain other appropriate equitable relief . . . to enforce any provision . . . of the plan."

We conclude that the cause of action asserted by the plaintiffs here relates to an employee benefit plan and that this is not a case where the impact of state law is "tenuous, remote, or peripheral." Therefore, since ERISA itself provides regulations for

an employer's obligations to fund a covered employee benefit plan, and also provides an exclusive set of remedies for violations of its requirements, the state law claims asserted by the plaintiffs here are preempted. Consequently, following the decision of the Supreme Court in Metropolitan Life v. Taylor, removal to federal court is proper in this case and the motion to remand is denied.

I will endorse the original of the motion papers "Motion denied. See oral opinion this date."

(September 18, 1989)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT A. ALBERT, RICHARD W. PALIZAY, and SAMUEL R. SCHAFFER, on behalf of themselves and all other similarly situated,	:	89 Civ. 6083 (LBS)
Plaintiffs,	:	OPINION
-against-	:	
AVERY, INC., a Delaware Corporation; NELSON PELTZ and PETER MAY, as Officers and Directors; UNIROYAL CHEMICAL HOLDING CO., a Delaware Corporation; UNIROYAL CHEMICAL ACQUISITION CO., a New Jersey Corporation; UNIROYAL CHEMICAL CO., INC., a New Jersey Corporation; UCC INVESTORS HOLDING, INC., a Delaware Corporation; ROBERT J. MAZAIKA, as Officer and Director; and DREXEL BURNHAM LAMBERT INCORPORATED,	:	
Defendants.	:	

APPEARANCES: November 6, 1989

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RENDERED ORALLY
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I. PHILIP SIPSER, ESQ. OCTOBER 10, 1989
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THE COURT:

Plaintiffs seek to enjoin the sale by Avery, Inc., of the stock of its indirectly owned subsidiary Uniroyal Chemical Company, Inc., to a group of management investors. Defendant Avery owns one hundred percent of the stock of Uniroyal Chemical Holding Company, which in turn owns through an intermediate subsidiary all the stock of Uniroyal Chemical.

In the proposed transaction, Avery would sell its stock in Uniroyal Chemical Holding Company, pursuant to a stock purchase agreement approved by Avery's shareholders on September 21, 1989, to UCC Investors Holding, Inc., a new holding company, created by defendant Mazaika and other top executives of Uniroyal Chemical. The proposed transaction is a sale of stock for an approximate price of $800 million.

The named plaintiffs claim to represent a class of present and former salaried employees of Uniroyal Chemical who are beneficiaries of the company's employee benefit plans. Under the plans, certain retired employees are eligible for pension, health and life insurance benefits. Under the Employee Retirement Income Security Act of 1974, as amended, hereinafter referred to as ERISA, 29 U.S.C. Sections 1001 to 1461 (1982 & Supp. V. 1987), Uniroyal Chemical must periodically place funds with a trustee to cover its future pension liabilities. ERISA, however, does not require that vested pension liabilities be fully funded, and Uniroyal Chemical's unfunded pension liability is approximately $37 million. In addition, ERISA does not require any vesting or prefunding for the health and life insurance benefits, and Uniroyal Chemical pays those costs from its current income.

Plaintiffs claim that as beneficiaries of the unfunded pension, health and life insurance obligations, they are entitled to the same statutory and common law protections afforded other creditors of Uniroyal Chemical. Plaintiffs' complaint asserts five causes of action, all arising under New York State law, for fraudulent conveyance, corporate fraudulent transfer, breach of fiduciary duty, corporate waste, and unjust enrichment. As relief, plaintiffs seek to enjoin the sale of Uniroyal Chemical "unless and until such time as a fund is set aside to provide for all unfunded retirement obligations owed to the class." Complaint at 15.

Plaintiffs allege that the actual market value for Uniroyal Chemical is only $700 million, a sum insufficient for Avery to discharge its own debts.

"To solve this problem, Avery effectively bribed the management investors who formed UCC Investors to pay $800 million (including the assumption of Avery

debt) for Uniroyal Chemical, by offering them 'incentive pay' of $6.6 million if Uniroyal Chemical was sold for at least $800 million. By investing this 'incentive pay' in UCC Investors, the management group in effect would wind up with a free twenty-five percent equity interest in Uniroyal Chemical."

Plaintiffs' memorandum in support of motion for preliminary injunction at 2.

Plaintiffs allege that since little or no new equity will be paid into Uniroyal Chemical, and since Uniroyal Chemical's debt burden will increase, the proposed transaction will leave Uniroyal Chemical "seriously undercapitalized and overindebted and unable to meet its future obligations to the plaintiffs as they mature." Complaint, Paragraph 30, at 12.

Plaintiffs provide an affidavit from an expert witness who concludes, "I believe that these retirement benefits will be placed in jeopardy, as the risk is

significant that either Uniroyal Chemical or its acquirer, UCC Holding, will be unable to meet the annual costs of these benefits and the future unfunded pension retirement, health, and life insurance obligations as they mature." Affidavit of Carl A. Goldman in support of motion for preliminary injunction, Paragraph 41, at 32.

Defendants respond that Uniroyal Chemical is in full compliance with its obligations to fund its employee benefit plans under the terms of ERISA, and that plaintiffs' claims of future noncompliance are mere speculation. Defendants provide an affidavit from their expert witness to rebut plaintiffs' claims and demonstrate the economic viability of the proposed transaction. See affidavit of Peter H. Rothschild in opposition to plaintiffs' motion for preliminary injunction.

This case was originally filed in state court. The defendants removed this case to federal court, pursuant to 28 U.S.C., Sections 1441 and 1446. And on September 18, 1989, this Court denied plaintiffs' motion to remand. See this Court's oral opinion of September 18, 1989, which we will deem attached as Exhibit A.

The Pension Benefit Guaranty Corporation requested that this Court delay its ruling on the pending motions to enable that agency to review the case and advise the Court of its views. By letter dated October 6th, 1989, received in chambers this morning, the PBGC advises that it takes no view on the merits of the case, but it urges that this Court not rely on the PBGC's limited post-event review of a transaction, such as is proposed here, as an adequate protection for persons in plaintiffs' status. We are so advised.

First, this Court has before it today plaintiffs' motion pursuant to 28 U.S.C., Section 1447(c), for reconsideration of its denial of plaintiffs' motion to remand. Plaintiffs argue that two cases not cited in their briefs or in oral argument on the original motion require that this Court grant their motion to remand. On reconsideration, this Court adheres to its previous decision and denies plaintiffs' motion to remand.

In those two cases, Local 445 Welfare Fund v. Wein, 855 F.2d 62 (2d Cir. 1988) and Retirement Fund of the Fur Manufacturing Industry v. Getto & Getto, Inc., 714 F. Supp. 651 (S.D.N.Y. 1989), the courts allowed plaintiffs to use state law procedures to collect debts from defendants who had previously violated ERISA. On the other hand, plaintiffs here seek to use state law claims to ensure the payment in the future of obligations that are not yet due and owing. While ERISA preemption may not extend to state law causes

of action to collect an existing debt created by an ERISA obligation, plaintiffs' claims here for payments above ERISA's minimum funding requirements do "relate to" an ERISA plan and are therefore preempted.

After additional briefing and argument, this Court also has before it today plaintiffs' motion for preliminary injunction and defendants' cross motion for dismissal, presumably under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

For the following reasons, plaintiffs' motion for a preliminary injunction is denied, and defendants' motion to dismiss is granted. Plaintiffs, however, are granted leave to further amend their complaint as set forth herein.

This Court held in its September 18th oral opinion and reaffirms today that plaintiffs' state law causes of action are preempted by ERISA under the

complete preemption doctrine as explained in two recent Supreme Court cases, Pilot Life Insurance v. Dedeaux, 481 U.S. 41 (1987) and Metropolitan Life Insurance v. Taylor, 481 U.S. 58 (1987), and the Second Circuit opinion in Aetna Life Insurance v. Borges, 869 F.2d 142 (1989).

Since Congress intended that ERISA's detailed statutory provisions would constitute the exclusive set of rights and remedies governing employee benefit plans, the state law claims in plaintiffs' complaint do not state a legal basis on which relief may be granted. Thus, the motion to dismiss as addressed to the complaint as filed is therefore granted.

However, since this case involves a pending transaction with an imminent closing date, plaintiffs at oral argument of this motion were given an opportunity to amend their complaint without prejudice to their ability to appeal the denial of the motion to remand.

This Court therefore deems plaintiffs' complaint amended to incorporate a claim for equitable relief under Section 502 of ERISA, 29 U.S.C., Section 1132.

ERISA Section 502(a)(1)(B) provides: "A civil action may be brought -- (1) by a participant or beneficiary -- (B) to cover benefits due to him under the terms of his plan or to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

Section 502(a)(3) provides: "A civil action may be brought -- (3) by a participant, beneficiary or fiduciary, (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

Plaintiffs argue that since the proposed transaction will result in an imminent violation of

ERISA, "Section 502 authorizes the Court to fashion broad equitable remedies to assure the future funding of a plan and to prevent unfunded liabilities." Plaintiffs' supplemental memorandum in support of motion for preliminary injunction at 5.

Defendants argue in their papers that Section 502 does not grant the Court remedial authority to address future or prospective violations of ERISA, only present or past violations. However, this court is of the view that this contention, initially advanced by defendants, although somewhat modified in their oral presentation to this Court, is inconsistent with the broad scope of remedial powers granted in Section 502.

In making a determination whether injunctive relief is available under Section 502 for the violation of an ERISA right, a federal court is free to draw upon equitable concepts developed in other areas of law to determine whether the action sought to be enjoined is

imminent or inevitable and what would be the consequences of that action. Defendants conceded at oral argument, and we agree, that if a fraudulent transaction is about to be consummated, the consequences of which would be a present or imminent violation of ERISA, then a federal court would have the power under Section 502 to enjoin the transaction in order to prevent the harm, assuming, of course, that the other requirements for injunctive relief are satisfied.

For example, if a transaction would involve the certain expenditure for some non-ERISA purpose of funds set aside in trust under ERISA, then the Court could enjoin that transaction before it was consummated. Or, if a payment to the ERISA trust were due tomorrow and the employer was about to make a payment to a third party or distribute a liquidating dividend, which would clearly prevent it

from making the required ERISA contribution, then Section 502 would, we believe, permit a court to issue an injunction, even though no ERISA violation had yet occurred.

In other words, applying judicial equitable principles, a federal court may enjoin under Section 502 any transaction which is about to occur, the immediate, foreseeable, indeed, inevitable consequence of which would be an ERISA violation.

In light of this view, this Court must first decide whether the completion of the proposed transaction would prevent Uniroyal Chemical from meeting its future obligations imposed by ERISA, and that this consequence is so certain to occur under the standards the Court has previously stated as to entitle the plaintiffs to relief under Section 502.

When deciding motions to dismiss, the Court should not dismiss the complaint pursuant to Rule

12(b)(6) unless it appears "beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Goldman v. Belden, 754 F.2d 1059 (2d Cir. 1985), citing Conley v. Gibson, 355 U.S. 41, 45-46.

Applying this concept, this Court grants defendants' motion to dismiss, insofar as it relates to the claims for health and life insurance benefits. The health and insurance plans qualify as "welfare benefit plans" under Section 3(1) of ERISA, 29 U.S.C., Section 1002(1).

According to Uniroyal Chemical's "Summary Plan Description," Uniroyal Chemical has reserved the right to amend or terminate its health and insurance plans at any time. Since welfare plans are exempt from ERISA's detailed minimum participation, vesting and minimum funding requirements, plaintiffs have not alleged in their complaint, as we deem it amended, any

imminent violation of those plans. See Moore v. Metropolitan Life Insurance Co., 856 F.2d (2d Cir. 1988).

Turning then to the pension benefits, plaintiffs do not allege that Uniroyal Chemical has failed to make any payments to its ERISA pension trust when due. This Court must therefore decide whether the proposed sale of the stock of Uniroyal Chemical would produce an immediate or inevitable violation of ERISA's regulations relating to pension benefits. This Court also concludes that plaintiffs have not shown that an immediate and foreseeable consequence of the proposed leveraged buyout will be the complete inability of Uniroyal Chemical to make future contributions to the pension plan trustee when required by ERISA's minimum funding provisions.

To support their predictions for financial disaster for Uniroyal Chemical if the leveraged buyout is

completed, plaintiffs rely principally on two affidavits from Carl A. Goldman. Mr. Goldman predicts that as a result of the transaction debt, the annual interest expense of Uniroyal Chemical will be approximately $112 million. Mr. Goldman's analysis also shows that Uniroyal Chemical's "free cash flow," that is, its earnings before interest and taxes, which presumably already includes Uniroyal Chemical's pension expenses, plus non-cash items, less capital expenditures, equals $125 million in 1988. After making certain assumptions about the business prospects of Uniroyal Chemical and the general state of the national economy, Mr. Goldman concludes that it is unlikely that Uniroyal Chemical with sustain its earnings level, that its interest expenses will likely exceed its cash flow, and therefore "there is a significant risk that it (Uniroyal Chemical) will be rendered insolvent." Affidavit of Carl A. Goldman, Paragraph 33.

However, it is not enough for Mr. Goldman to convince this Court that the cash flow of Uniroyal Chemical will probably be insufficient to cover its interest expense in the near future. Many successful deals do not initially produce a positive return. Furthermore, even if Uniroyal Chemical were to experience cash flow difficulties, Uniroyal Chemical might not necessarily choose to default on its pension obligations. Other possible remedial measures could include a further infusion of capital, or sale of assets of Uniroyal Chemical.

Rather than focusing simply on the projections for cash flow to determine whether Uniroyal Chemical will have the ability to fund its pension liabilities, this Court must examine the transaction as a whole and determine whether the terms are so unreasonable that as an immediate and foreseeable consequence of its execution, Uniroyal Chemical will be rendered insolvent

and unable to meet its pension obligations. Forecasting future business performance is naturally a speculative task. And in cases involving high risk transactions, such as this one, courts will frequently be confronted with affidavits supporting opposite conclusions.

We conclude that the plaintiffs' complaint, as we deem it to have been amended, does not allege sufficient facts to show that an immediate and foreseeable consequence of the proposed leveraged buyout will be Uniroyal Chemical's inability to make its ERISA contributions when due.

Plaintiffs argue that the burden of proof in this case rests with the defendants because the plaintiffs allege that they have engaged in self-dealing. Whether the burden is on the defendants to show the financial adequacy of the transaction or the burden is on the plaintiffs to prove its financial inadequacy, this Court's conclusion would be unchanged.

Because of the extreme time pressure thrust upon this Court, we have utilized the procedure of deeming the plaintiffs' complaint to have been orally amended, and that the orally amended complaint contains all that the plaintiffs have submitted, both in support of the motion for preliminary injunction and in opposition to the motion to dismiss.

This procedure, which we believe was appropriate, does, however, create certain difficulties in dealing with the defendants' motion as a motion to dismiss. Normally, on a motion to dismiss, the Court confines its inquiry to the four corners of the complaint without resort to affidavits. If resort is had to affidavits, the motion is then converted to a motion for summary judgment, the parties are given notice thereof, and the matter proceeds on that basis.

We have for these purposes, as I have stated, assumed that the plaintiffs' complaint has been

amended to include all of the factual material which they have presented to the Court. It might however be contended that since this Court recognizes that under some limited circumstances a complaint may be drafted under Section 502 of ERISA to enjoin a proposed transaction, that it would be more appropriate to await the filing by the plaintiffs of an amended complaint, specifically drafted under ERISA, to which amended complaint the defendants would thereafter answer or move.

For that reason, we grant the plaintiffs leave, if they wish to, to file within ten days from today's date an amended complaint, if they believe that they can in good faith frame a complaint which could withstand a motion the dismiss under the legal criteria set forth above. If the plaintiffs choose to file such an amended complaint, defendants would then either answer or

move, and the matter would proceed in the usual fashion.

Again, recognizing the exigent nature of the questions presented and the need of the parties for a comprehensive ruling to enable appellate review, this Court has gone on to consider the question whether if one assumes arguendo that the plaintiffs could file an amended complaint which could withstand a motion to dismiss, i.e., a complaint which alleged that the inevitable imminent consequences of the transaction would be to result in an ERISA violation, plaintiffs are entitled to a preliminary injunction.

The standards for granting a preliminary injunction are, of course, well established in this circuit. Plaintiffs must show irreparable harm and either a likelihood of success on the merits, or sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of the

hardships tipping decidedly toward the party requesting preliminary relief.

Plaintiffs have not shown a likelihood of success on the merits. That is fully indicated by the determination to grant defendants' motion to dismiss and the analysis contained in this opinion. Moreover, in determining the appropriateness of preliminary injunctive relief, this Court is, of course, free to consider the affidavits submitted in opposition to the motion. Mr. Peter H. Rothschild's affidavit explains that a substantial portion of the future interest expense will not be payable in cash, but rather in securities. Affidavit of Peter H. Rothschild, Paragraph 12.

For example, Mr. Rothschild projects Uniroyal Chemical's total interest expense in 1990 at $120.7 million, but only $96.8 million will be paid in cash. Therefore, as a result of the proposed transaction, defendants argue, Uniroyal Chemical's cash interest

expense will decrease, and it will be less likely that Uniroyal Chemical will experience cash flow problems in the near future.

Thus, plaintiffs cannot show a likelihood of success on the merits. And if one were, arguendo, to consider the other prong of the test, that it is a fair ground for litigation and a balance of the hardships tipping decidedly toward the party requesting preliminary relief, we are of the view that the balance of hardships in this case tilts decidedly towards the defendants. If the transaction does not close as scheduled on October 13th, the defendants will incur $91,000 per day in costs attributable to servicing its debt obligations. Affidavit of Joseph A. Levato, Paragraph 15.

Plaintiffs have advised the Court that they are not prepared to bond in any fashion any loss suffered by defendants if injunctive relief is granted.

If this transaction is not completed by November 1, 1989, the temporary waiver of default and amendment to the indenture of the Avery debentures will expire. And the holders of those debentures could accelerate the payment of the entire $80 million principal amount. Affidavit of Joseph A. Levato in opposition to plaintiffs' motion for preliminary injunction, Paragraph 11, 14.

The consequences to the defendants of any delay is possible bankruptcy of Avery and loss of the proposed transaction. Given the immediate and specific potential injury to the defendants, as contrasted to the deferred and speculative harm to the plaintiffs, the balance of hardships in this case favors the defendants. Therefore, the motion for a preliminary injunction should be denied, even if this Court were to deny defendants' motion to dismiss, and assume, as we have done in this portion of the opinion, that the plaintiffs

could frame a complaint which at least within its four corners could allege an ERISA violation.

In reaching this conclusion, we have recognized that questions of ERISA preemption are often close and difficult ones. We are of the view, however, given the factual situation and the economic analysis, that even were this Court dealing with this matter solely as a question of state fraudulent conveyance law, a preliminary injunction would be inappropriate, given the vagueness of plaintiffs' claim, the remoteness and speculative nature of the potential injury to the plaintiffs, and the immediacy and magnitude of the injury to the defendants, were this Court to enjoin the transaction which is scheduled to close some three days hence.

In sum, the motion to dismiss is granted, with leave to amend as stated herein. The motion for a preliminary injunction is denied.

SO ORDERED.
Dated: November 6, 1989
NEW YORK, NEW YORK

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT A. ALBERT, RICHARD W. PALIZAY, and SAMUEL R. SCHAFFER, on behalf of themselves and all other similarly situated,	:	89 Civ. 6083 (LBS)
Plaintiffs,	:	ORDER
-against-	:	
AVERY, INC., a Delaware Corporation; NELSON PELTZ and PETER MAY, as Officers and Directors; UNIROYAL CHEMICAL HOLDING CO., a Delaware Corporation; UNIROYAL CHEMICAL ACQUISITION CO., a New Jersey Corporation; UNIROYAL CHEMICAL CO., INC., a New Jersey Corporation; UCC INVESTORS HOLDING, INC., a Delaware Corporation; ROBERT J. MAZAIKA, as Officer and Director; and DREXEL BURNHAM LAMBERT INCORPORATED,	:	
Defendants.	:	

Upon the Complaint; the Affidavits of Jerome Tauber, Robert A. Albert, Richard W. Palizay,

Samuel R. Schaffer, and Carl Goldman, in Support of the Motion for Preliminary Injunction; the Affidavits of Neil A. Melore, Peter H. Rothschild, Laurence I. Silverman, Robert C. Eaker, and John Young in Opposition to the Motion for a Preliminary Injunction; the Reply Affidavit of Carl Goldman; Defendants' Cross-Motion to Dismiss; the Memoranda of Law; and upon all other prior papers and proceedings heretofore had herein, and

The Court having heard the Motion for a preliminary injunction pursuant to FRCP Rule 65 and the cross-motion to dismiss the complaint pursuant to FRCP Rule 12 on October 10, 1989 and Sipser, Weinstock, Harper and Dorn, attorneys for the plaintiffs having appeared for the Motion for a Preliminary Injunction and in opposition to the Cross-Motion to Dismiss and Cahill Gordon and Reindel and Dewey, Ballantine, Bushby Palmer & Wood, attorneys

for the defendants having appeared in opposition to the Motion for a preliminary injunction and in support of the cross-motion to dismiss, and due deliberation having been had thereon, it is

ORDERED that the Motion for a preliminary injunction is hereby denied and the cross-motion to dismiss is hereby granted and the complaint is hereby dismissed with leave to amend as set forth in the decision of this Court entered on the record on October 10, 1989.

*

Dated: New York, New York
October 12, 1989

U.S.D.J.

* It is further ORDERED that plaintiffs' motion for a stay (injunction) pending appeal is denied.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the united States Courthouse in the City of New York, on the 14th day of November, one thousand nine hundred and eighty-nine.

Present: Entered on November 14, 1989

Hon. James L. Oakes,
Chief Judge.
Hon. Amalya L. Kearse,
Hon. Frank X. Altimari,
Circuit Judges.

ROBERT A. ALBERT, RICHARD W. PALIZAY, and SAMUEL H. SCHAFFER, on behalf of themselves and all those similarly situated,

Appellants,

-against- 89-7970

AVERY, INC., a Delaware Corporation; NELSON PELTZ and PETER MAY, as Officers and Directors; UNIROYAL CHEMICAL HOLDING CO., a Delaware Corporation; UNIROYAL CHEMICAL ACQUISITION CO., a New Jersey Corporation; UNIROYAL CHEMICAL CO., INC., a New Jersey Corporation; UCC INVESTORS HOLDING, INC., a Delaware Corporation; ROBERT J. MAZAIKA, as Officer and Director; and DREXEL BURNHAM LAMBERT INCORPORATED,

Appellees.

ORDER

The plaintiffs, a class of both active and retired employees of the Uniroyal Chemical Company, Inc. ("Uniroyal Chemical"), appeal from a ruling of the Southern District of New York. Leonard B. Sand, Judge, holding their claim for injunctive relief properly removed under 28 U.S.C. § 1441(a) (1982) and refusing to remand it to the state court in which it originally was brought. We affirm.

In its initial complaint, filed on September 8, 1989, in New York Supreme Court, the plaintiff class sought to enjoin an impending acquisition of Uniroyal Chemical Holding Co. ("Holding Company"), which owns Uniroyal Chemical through an intermediate subsidiary, Uniroyal Chemical Acquisition Co., Avery

Inc., ("Avery") is the sole owner of the Holding Company and is in the midst of closing a deal under which UCC Investors Holding, Inc. ("UCC Investors"), formed by a group of Uniroyal chemical management executives, is to purchase the Holding Company from Avery, and thereby assume control of Uniroyal Chemical, for a price of $800 million.

The plaintiff class asserted in its complaint that the impending acquisition will drastically increase Uniroyal Chemical's debt burden and consequently will threaten Uniroyal Chemical's ability to meet the present and future pension, life insurance, and health insurance obligations owed to the plaintiff class. As grounds for relief, the class advanced five state common law and statutory doctrines: fraudulent conveyance, corporate fraudulent transfer, breach of fiduciary duty, corporate waste, and unjust enrichment.

The defendants, which include Avery, Uniroyal Chemical, the Holding Company, and UCC Investors, removed to federal court. On September 18, 1989, Judge Sand denied the plaintiff class' motion to remand, finding the action properly removable under Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987), which allows removal of an action raising state law claims when the state law claims are pre-empted by § 514(a) of the Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1144 (a) (1982), and fall within the scope of the civil enforcement provisions of ERISA § 502(a), 29 U.S.C. § 1132(a) (1982). On October 10, 1989, pursuant to plaintiff class' motion for reconsideration, Judge Sand reaffirmed his prior ruling on the removal issue. Additionally, he dismissed under Fed. R. Civ. P. 12(b)(6) the plaintiff class' claims insofar as they sought relief for alleged insufficient

funding of Uniroyal Chemical's life insurance and health insurance obligations. Finally, Judge Sand refused to grant a preliminary injunction to halt the acquisition until the defendants set aside funds necessary to insure pension obligations owed to the class.

On October 17, 1989, a panel of this Court expedited the case for appeal. Argument was heard on October 25, 1989. At oral argument, counsel for the plaintiff class stated that grounds for appeal were limited solely to the question of whether Judge Sand properly held this action removable. Accordingly, we limit our discussion below to this one question.

DISCUSSION

In Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987), the Supreme Court held that when a plaintiff's state law action is pre-empted by § 514 (a)

of ERISA and states a claim falling within the scope of the civil enforcement actions under § 502(a) of ERISA, the case is considered to arise under ERISA and thus is properly removable to a federal court. Accordingly, the question of whether this case is removable turns upon whether the plaintiff class' state law claims are pre-empted by ERISA and whether they fall within the scope of ERISA's civil enforcement provisions.

ERISA § 514 (a) pre-empts "state laws insofar as they... relate to any employee benefit plan [under ERISA]." 29 U.S.C. § 1144(a). The Supreme Court has held that ERISA pre-emption "is not limited solely to "state laws specifically designed to affect employe benefit plans.'" See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47-48 (1987) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983)). Thus, ERISA will also pre-empt both state statutes of general

application which "bear[] indirectly but substantially" upon ERISA benefit plans, See Pilot Life, 481 U.S. at 48.

We find that the state claims advanced here by the plaintiff class would impact substantially upon ERISA obligations and thus fall within ERISA's pre-emption clause. The plaintiff class seeks to impose various state law duties upon corporate officials and those attempting to acquire corporations when their activities might affect pension benefits owed to ERISA beneficiaries. Unquestionably, the effect that such duties would have upon the way in which corporations manage their ERISA obligations would be substantial. Accordingly, we find no difficulty in holding that the plaintiff class' state law claims "relate to" an ERISA employee benefit plan and thereby are pre-empted by ERISA.

The second prong of the Metropolitan Life v. Taylor test mandates that the plaintiff's claim fall within the scope of ERISA's civil enforcement provisions. Here, too, we find that the action brought by the plaintiff class falls within ERISA's enforcement provisions. ERISA allows plan beneficiaries to seek injunctive relief to enforce their rights under ERISA, see 29 U.S.C. S 1132(a)(3) (1982), and ERISA grants plan beneficiaries the right to have employee benefit plans abide by certain minimum funding requirement. See 29 U.S.C. 1081-82 (1982 & Supp. V 1987). As a matter of common sense, it is clear to us that the backbone of the class claim is an injunction geared to secure funding of pension benefits owed the class under Uniroyal Chemical's employee benefit plan. Although class counsel urges that what the claim really seeks is to enjoin a fraudulent conveyance, as opposed to enforce

any rights due under ERISA, we find the semantic distinction unpersuasive. The goal of the plaintiff class' claim is protection of ERISA rights; the way in which it characterizes the means for protecting these rights is irrelevant to the question of whether the rights fall within ERISA. Accordingly, we find the plaintiff class' state law claim subsumed by ERISA.

In sum, because the state law claims advanced by the plaintiff class both are pre-empted by ERISA and fall within the scope of ERISA's civil enforcement provisions, we rule that Judge Sand properly found the action removable under Metropolitan Life v. Taylor.

Finally, to avoid confusion, we stress that our ruling above that the plaintiff class' claim for relief is pre-empted by ERISA does not mean that ERISA necessarily forecloses relief the plaintiff class may see.

Instead, we hold only that to the extent that the plaintiff class may have a claim for relief in this action, such relief would come under ERISA and not under the five state law grounds advanced by the plaintiff class in its initial complaint. We express no opinion as to the ultimate issue of whether ERISA would furnish the plaintiff class its sought after relief.

Docket No. 89-7970

Judgment affirmed.

James L. Oakes,
Chief Judge.

Amalya L. Kearse,

Frank X. Altmari,
Circuit Judges.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ROBERT A. ALBERT, RICHARD W. PALIZAY, and SAMUEL R. SCHAFFER, on behalf of themselves and all other similarly situated,	:	Index No.
Plaintiffs,	:	**COMPLAINT**
-against-	:	
AVERY, INC., a Delaware Corporation; NELSON PELTZ and PETER MAY, as Officers and Directors; UNIROYAL CHEMICAL HOLDING CO., a Delaware Corporation; UNIROYAL CHEMICAL ACQUISITION CO., a New Jersey Corporation; UNIROYAL CHEMICAL CO., INC., a New Jersey Corporation; UCC INVESTORS HOLDING, INC., a Delaware Corporation; ROBERT J. MAZAIKA, as Officer and Director; and DREXEL BURNHAM LAMBERT INCORPORATED,	:	
Defendants.	:	

Plaintiffs, by their attorneys, Sipser, Weinstock, Harper & Dorn, as their Complaint against Defendants allege as follows:

NATURE OF THE ACTION

(a) This is an action to enjoin the leveraged management buyout of the Defendant Uniroyal Chemical Holding Co. ("UCHC"), a shell corporation which through a wholly owned subsidiary, Defendant Uniroyal Chemical Acquisition Co. ("UCAC"), owns 100% of the stock of the Defendant Uniroyal Chemical Company, Inc. ("Uniroyal Chemical") on the grounds that such transaction constitutes a fraudulent conveyance and breach of duty owed to the Plaintiffs and the class they represent which will render Uniroyal Chemical unable to meet its retirement benefit obligations to the Plaintiffs and the Class they represent as such obligations mature.

JURISDICTION AND VENUE

(b) Defendants reside or transact business in and the causes of action arise in the State of New York, County of New York. The court has jurisdiction over the nondomiciliary defendants under C.P.L.R. § 302.

PARTIES

(c) Defendant Avery, Inc. ("Avery") is a Delaware corporation with its principal office at 900 Third Avenue, New York, New York 10022. Since October 30, 1986, Avery's primary business has been the manufacture and sale of specialty chemicals and elastomers through Defendant Uniroyal Chemical Company, Inc. ("Uniroyal Chemical"). Avery also mines, processes and sells bituminous steam coal through Avery Coal Co., Inc. ("Avery Coal"), a wholly owned subsidiary.

(d) Defendant Uniroyal Chemical Holding Corp. ("UCHC") is a Delaware corporation wholly owned by Avery. Defendant Uniroyal Chemical Acquisition Corporation ("UCAC") is a New Jersey corporation, a wholly owned subsidiary of UCHC, and a wholly owned indirect subsidiary of Avery. UCAC's sole asset is the stock of Defendant Uniroyal Chemical Company, Inc. UCHC's and UCAC's principal office is at 900 Third Avenue, New York, New York 10022.

(e) Defendant Uniroyal Chemical Company, Inc. ("Uniroyal Chemical") is a New Jersey corporation with principal offices in Middlebury, Connecticut, a direct wholly owned subsidiary of UCAC, and an indirect wholly owned subsidiary of Avery and UCHC acquired by Avery on October 30, 1986. Previously, Uniroyal Chemical had been a subsidiary (and earlier an unincorporated operating division) of Uniroyal, Inc. Avery, through its subsidiaries, purchased Uniroyal Chemical from

Uniroyal, Inc. for $710 million. Uniroyal Chemical transacts business in New York.

(f) Defendant UCC Investors Holding Inc. ("UCC Investors") is a Delaware corporation with principal offices in Middlebury, Connecticut formed for the sole and exclusive purpose of purchasing Uniroyal Chemical, through a purchase of the stock of Defendant UCAC or Defendant UCHC, from Defendant Avery. Defendant Mazaika, and certain principals of Defendant Drexel, are directors of UCC Investors.

(g) Defendant Drexel, Burnham, Lambert Incorporated ("Drexel") is a _____ corporation with its principal offices at 60 Broad Street, New York, New York. Drexel arranged financing for both the purchase of Uniroyal Chemical by Avery in 1986 and the proposed sale of UCHC which is the subject of this action.

(h) Defendants Nelson Peltz and Peter May are the principal directors, officers and shareholders of Avery.

(i) Defendant Robert J. Mazaika is president and a director of Uniroyal Chemical, a director of Avery, a director of UCC Investors, and the leader of a management group consisting of approximately fifty (50) other executives and employees of Uniroyal Chemical who are principals of UCC Investors and the proposed purchasers of Uniroyal Chemical from Avery.

(j) Plaintiffs are retirees of Uniroyal Chemical or employees of Uniroyal Chemical currently eligible to retire and are participants in Uniroyal Chemical's pension and medical and life insurance plans.

THE CLASS ACTION ALLEGATIONS

(k) This action is commenced pursuant to C.P.L.R. § 901 as a class–action on behalf of the Class consisting of:

a. All Uniroyal Chemical salaried employees who are eligible to retire under the Uniroyal Chemical Pension Plan for salaried employees, and their eligible spouses and dependents; and

b. All former salaried employees of Uniroyal Chemical who retired on or after December 3, 1986 and their eligible spouses and dependents.

(l) The Class, which has approximately 300 members not including spouses and dependents, is

so numerous that joinder of all members is impracticable. All questions of law and fact are common to the class, including whether the Defendants have breached their obligations to the Class by engaging in fraudulent conveyances, breaches of fiduciary duties, and corporate waste, whether the Defendants are being unjustly enriched, and whether the Defendants have wrongfully failed to provide for the payment of Plaintiffs' benefits as they become due following a leveraged buyout and substantial transfer of assets.

(m) The claims of the representative Plaintiffs are typical of the claims of the class, and the representative Plaintiffs will fairly and adequately represent the class. Plaintiffs Robert A. Albert, Richard W. Palizay and Samuel R. Schaffer are all retired salaried employees of Uniroyal Chemical, with (respectively) 32, 38 and 47 years of service to the

company and its predecessors, and are beneficiaries under the Uniroyal Chemical Pension Plan and Uniroyal Chemical Medical and Life Insurance Plans for salaried retirees. Their claim that the leveraged management buyout should be enjoined unless and until unfunded retirement benefit liabilities are fully funded is typical of the Class and they will fairly and adequately represent the interests of Class members. A Class action is superior to other available methods, if any even exist, for the fair and efficient adjudication of the controversy.

MATERIAL FACTS
THE RETIREMENT BENEFIT PLANS

(n) Uniroyal Chemical, UCAC, UCHC and Avery maintain employee benefit plans for eligible salaried employees of Uniroyal Chemical. Under the plans, salaried employees who retire have been promised and receive pension and health and life

insurance benefits for the remainder of their and their spouses' lives.

(o) The promised pension benefits for salaried employees and retirees are not fully funded and Uniroyal Chemical has a reported unfunded pension liability of at least $37 million.

(p) The promised health and life insurance benefits for salaried employees and retirees are not pre-funded but are provided out of current income. The reported cost of providing these benefits during the 12-month period ending September 30, 1988 alone exceeded $2 million, and because of medical inflation this will likely grow on an annual basis.

THE ACQUISITION AND PROPOSED SALE OF UNIROYAL CHEMICAL

(q) Avery, UCHC and UCAC incurred burdensome long-term debt (arranged by Drexel) to finance their purchase of Uniroyal Chemical for $710

million in October 1986, and restrictions on intercorporate payments agreed to in connection with the debt placed additional limits on Avery and its subsidiaries. As of September 30, 1988 the reported total long-term debt of Avery and its subsidiaries included over $870 million, substantially all arising out of the purchase of Uniroyal Chemical. An investment portfolio maintained by UCHC, originally financed out of proceeds of the acquisition debt and (because of the restrictions agreed to in connection with the debt) the only source from which those portions of the debt booked to UCHC or Avery itself can be serviced, had declined in value by approximately $100 million, to $140 million, and would be exhausted long before UCHC's and Avery's debt could be repaid. UCAC's annual interest expense alone approached $90 million, substantially equal to the operating income of Uniroyal Chemical in its best year. To make required payments on debt securities, Avery had twice had to borrow

additional funds from Triangle, another company dominated by Peltz and May, to whom Triangle subsequently assigned Avery's debt. For the quarter ending March 1989, Avery announced that it would be unable to make another required payment and obtained a temporary waiver from the security holders. Avery also announced that if the holders of its or UCHC's debt securities refuse exchange offers made by UCC Investors in connection with the proposed sale of UCHC (described below), Avery may file for bankruptcy protection. In short, Uniroyal Chemical's earnings in its best years are insufficient or barely sufficient to service Avery's and its subsidiaries' existing takeover debt; moreover, there is good reason to fear such earnings may decline.

(r) Avery has announced its intention to sell UCHC and its subsidiaries UCAC and Uniroyal Chemical, and Avery Coal (at a loss), and upon such sale to acquire new businesses or, if that proves

difficult, to liquidate Avery and distribute its assets to its shareholders.

(s) For over one year, Avery, which bought Uniroyal Chemical for $710 million in 1986 and has been barely able to service Avery's and its subsidiaries' resultant takeover debt, unsuccessfully sought a buyer for Uniroyal Chemical for a sales price in the range of $800 million, which would allow Avery to retire its debt and make a substantial profit. No one offered more than $700 million for Uniroyal Chemical.

(t) Because it could not find a buyer at a price in the range of $800 million, Avery, in 1988, entered into an agreement with Defendant Mazaika and 50 other management employees of Uniroyal Chemical (the "Management Participants") entitling them to a cash incentive if Uniroyal Chemical is sold for a net sales price of at least $800 million. The incentive pay for Mazaika alone will be $800,000 and

the total incentive pay to all Management Participants will be $6.6 million if the net sales price of Uniroyal Chemical is $800 million.

(u) Such "incentive payments" are in reality improper payments made by Avery to the Management Participants led by Mazaika to induce them to enter into a leveraged management buyout of Uniroyal Chemical at a price at or above $800 million, far above the fair market value.

(v) UCC Investors is a newly formed corporation, established by Mazaika and the other Management Participants for the sole purpose of purchasing Uniroyal Chemical, through its corporate parent or parents, from Avery. UCC Investors and Avery have agreed on a purchase price of $800 million, including assumed debt. The sale, in which UCC Investors will buy UCHC, is now scheduled to close on September 29 or 30, 1989, following approval by Avery's shareholders (principally defendants Peltz and

May) at Avery's annual meeting on September 21, 1989. Drexel has been retained to arrange financing, and will receive substantial fees. Mazaika, the Management Participants and Drexel will acquire a significant equity interest in UCC Investors by investing funds provided to them by Avery disguised as "incentive payments" and fees. Drexel, which arranged Avery's purchase of Uniroyal Chemical in 1986, will also have its reputation enhanced through the profit realized by Avery.

(w) After purchasing UCHC, UCC Investors will merge with it and the surviving company will own or merge into UCAC and Uniroyal Chemical. The surviving company will carry an enormous long term debt and will have annual interest payments alone of well over $110 million, far more than UCAC had to pay and far more than it can reasonably expect to service out of Uniroyal Chemical's cash flow. In effect, the purchase, at an inflated price, of Uniroyal

Chemical is being financed almost entirely through high-risk ("junk") securities sold or exchanged by Drexel. These securities' high risk will be offset by high yield which will mean crushing interest payment requirements, to the detriment of Uniroyal Chemical and its existing creditors. No fair consideration for the obligations incurred by the surviving company will be given.

(x) As a result of the sale, brought about by the "incentive payments," Avery, which purchased Uniroyal Chemical on October 30, 1986 for $710 million and which would have difficulty retiring its own takeover debt, will extricate itself from this difficulty and will sell Uniroyal Chemical after less than two years for $800 million, a $90 million profit. The principal shareholders of Avery, Defendants Peltz and May, have already reaped millions of dollars in profits in the form of salaries from Avery for non-exclusive and non-full-time services and payments by

Avery to other corporations which Peltz and May control.

(y) As part of the transaction the Management Participants and Drexel, by investing their "incentive payments" and fees in the leveraged buyout, will be able to acquire a substantial equity interest in Uniroyal Chemical (approximately 25%) at no cost, risk or obligation to themselves. The Management Participants' "investment" in UCC Investors will approximate only $7 million, including an unknown quantity of non-recourse promissory notes; virtually all the $800 million sales price paid to Avery will be supplied through debt arranged or exchanged by Defendant Drexel. Thus, Mazaika and the Management Participants will receive a 25% interest in Uniroyal Chemical at no cost, risk or obligation to themselves, because of the fraudulent $6.6 million in incentive pay they will be paid for selling the company to themselves for in excess of $800 million.

(z) As Officers and Directors of UCC Investors, Mazaika and the Management Participants he led had a duty to purchase Uniroyal Chemical at a fair price and at the lowest price available. As Officers and Directors of Uniroyal Chemical, they had a duty to conserve its assets and not to waste them through unnecessary leveraging of a purchase. Instead, because of their conflict of interest and desire to obtain the incentive payments which would give them free individual equity interests in Uniroyal Chemical, Mazaika and the Management Participants agreed to the inflated purchase price of $800 million.

(aa) In connection with the sale of UCHC and its merger with UCC Investors, Drexel will be paid enormous fees which are not for fair consideration but which will permit Drexel to invest in and obtain a substantial equity interest in Uniroyal Chemical (approximately 15%, with substantial additional equity going to investors closely associated with Drexel)

without any expenditure of its own funds. Drexel, which arranged the original purchase of Uniroyal Chemical by Avery in 1986, will also profit from the transaction through the profit realized by Avery, since this will enhance Drexel's reputation while a default on Avery or UCHC debt securities or a bankruptcy by Avery would damage Drexel's reputation.

(ab) After selling UCHC, ridding itself of most debt through exchanges and using remaining cash to discharge its remaining liabilities, Avery intends to sell Avery Coal at a $3 million loss, and either purchase new businesses or liquidate and distribute Avery's remaining assets to its shareholders, particularly Peltz and May who will own about 85% of Avery's equity and will reap substantial personal profits without any fair consideration, in addition to their earlier profits from Avery.

(ac) As a result of the sale, the existing creditors of Uniroyal Chemical, including the present

and retired employees entitled to pension, health and life insurance benefits who comprise the Plaintiff Class, and their families, will be seriously injured and the ability of Uniroyal Chemical to meet its obligations to these creditors seriously impaired, because of the excessive debt burden acquired in connection with the inflated purchase price. Creditors such as the Plaintiff Class to whom Uniroyal Chemical has unmatured long-term obligations will be especially seriously injured by being subordinated to the new leveraged buyout creditors.

(ad) As a result of the leveraged buyout, sale and merger, Uniroyal Chemical will be seriously undercapitalized and overindebted and unable to meet its future obligations to the Plaintiffs as they mature.

AS A FIRST CAUSE OF ACTION
FRAUDULENT CONVEYANCE

(ae) The transactions complained of above, to wit:

a. the purchase of UCHC, UCAC and Uniroyal Chemical by UCC Investors from Avery at an inflated price in excess of fair market value;

b. the consequent incurrence by UCC Investors and Uniroyal Chemical of excessive new long term debt;

c. the merger of UCC Investors, UCHC and UCAC and/or their sole asset, Uniroyal Chemical;

d. the "incentive payments" to Mazaika and other Management Participants;

e. the payment of excessive fees to Drexel;

f. the distribution to Avery and to Peltz and May and other shareholders of Avery of proceeds from the sale of UCHC;

are not for fair considerations, will leave Uniroyal Chemical insolvent or severely undercapitalized, to the detriment of its creditors including the Plaintiffs and the class they represent, and constitute fraudulent conveyances.

(af) Unless the sale of UCHC, UCAC and Uniroyal Chemical complained of above is enjoined, the Defendants other than Uniroyal Chemical, UCHC, UCAC and UCC Investors will take their profits, leaving Plaintiffs without an adequate remedy against either them or Uniroyal Chemical, UCAC, UCHC and

UCC Investors which will be reduced to an undercapitalized or insolvent shell.

AS A SECOND CAUSE OF ACTION
CORPORATE FRAUDULENT TRANSFER

(ag) The transactions involving UCAC and Uniroyal Chemical complained of above also constitute illegal fraudulent transfers within the meaning of the New Jersey Business Corporation Act, NJSA 14A:14-10.

(ah) Unless the sale of UCHC, UCAC and Uniroyal Chemical complained of above is enjoined, the Defendants other than Uniroyal Chemical, UCHC, UCAC and UCC Investors will take their profits, leaving Plaintiffs without an adequate remedy against either them or Uniroyal Chemical, UCHC, UCAC and UCC Investors which will be reduced to an undercapitalized or insolvent shell.

AS A THIRD CAUSE OF ACTION
BREACH OF FIDUCIARY DUTY

(ai) As Directors and Officers of UCC Investors and Uniroyal Chemical, Mazaika and the Management Participants owed a fiduciary duty to both UCC Investors and Uniroyal Chemical to refrain from acts which will render them insolvent or unable to meet their obligations and to refrain from engaging in self interested transactions to their detriment.

(aj) In particular, Mazaika and the Management Participants owed a fiduciary duty to both UCC Investors and Uniroyal Chemical to arrange for UCC Investors to purchase Uniroyal Chemical from Avery at the lowest possible fair price. Rather than doing this, Mazaika and the Management Participants agreed to a highly inflated purchase price in excess of $800 million, in order to obtain the $6.6 million in "incentive payments" from Avery which enabled them to acquire a substantial personal ownership stake in

Uniroyal Chemical without investing their own funds, for their sole personal advantage, to the detriment of UCC Investors and Uniroyal Chemical, and in breach of their fiduciary duties.

AS A FOURTH CAUSE OF ACTION
CORPORATE WASTE

(ak) The improper acts complained of above constitute waste of the corporate assets of Uniroyal Chemical for which the Defendants other than Uniroyal Chemical and UCAC should be held personally liable.

AS A FIFTH CAUSE OF ACTION
UNJUST ENRICHMENT

(al) Unless this court uses its equitable powers to protect the Plaintiffs, as a result of the improper acts complained of above, all the Defendants other than Uniroyal Chemical and UCAC will be unjustly enriched at the expense of existing creditors of

Uniroyal Chemical including the Plaintiffs and the class they represent.

RELIEF

WHEREFORE, Plaintiffs request an order clarifying and enforcing their rights, granting such other relief as may be proper, and enjoining:

a. The sale of UCHC, UCAC or Uniroyal Chemical to UCC Investors;

b. The payment of fees to Drexel;

c. The payment of incentive pay to Mazaika and the Management Participants he leads;

d. The transfer to Avery of funds or the assumption of Avery's debt in connection with the sale of UCHC, UCAC or

Uniroyal Chemical, and the acquisition by Avery of other businesses or the liquidation of Avery and distribution of its assets to its shareholders;

unless and until such time as a fund is set aside to provide for all unfunded retirement obligations owed to the Class.

Dated: New York, New York
September 8, 1989

Yours, etc.

SIPSER, WEINSTOCK, HARPER & DORN
Attorneys for Plaintiffs
380 Madison Avenue
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(212) 867-2100

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT A. ALBERT, RICHARD W. PALIZAY, and SAMUEL R. SCHAFFER, on behalf of themselves and all other similarly situated,	:	89 Civ. 6083 (LBS)
Plaintiffs,	:	
-against-	:	
AVERY, INC., a Delaware Corporation; NELSON PELTZ and PETER MAY, as Officers and Directors; UNIROYAL CHEMICAL HOLDING CO., a Delaware Corporation; UNIROYAL CHEMICAL ACQUISITION CO., a New Jersey Corporation; UNIROYAL CHEMICAL CO., INC., a New Jersey Corporation; UCC INVESTORS HOLDING, INC., a Delaware Corporation; ROBERT J. MAZAIKA, as Officer and Director; and DREXEL BURNHAM LAMBERT INCORPORATED,	:	
Defendants.	:	

NOTICE OF REMOVAL

S I R S:

PLEASE TAKE NOTICE, that Avery, Inc., a Delaware corporation; Nelson Peltz and Peter May, individuals; Uniroyal Chemical Holding Co. ("UCHC"), a Delaware Corporation; Uniroyal Chemical Acquisition Co., a New Jersey Corporation ("UCAC"), Uniroyal Chemical Co., Inc. ("UCC") a New Jersey Corporation; UCC Investors Holding, Inc., a Delaware Corporation; Robert J. Mazaika, as individual; and Drexel Burnham Lambert Incorporated, a Delaware Corporation (collectively, the "Removing Defendants"), being all of the defendants in the above-captioned cause, based upon the following averments, by their undersigned attorneys hereby remove this action from the Supreme Court of the State of New York, County of New York, to the United States District Court for the Southern District of New York, pursuant to 28

U.S.C. §§ 1441 and 1446. The defendants allege as follows:

1. Removing Defendants are the only defendants in this action. This notice for removal is filed within the time allowed by 42 U.S.C. § 1446(b).

2. Venue is proper in this Court because the place in which the state court action was instituted lies within the Southern District of New York.

3. This action has been commenced against defendants in the Supreme Court of the State of New York, County of New York, Index No. 19492/89 (IAS Part 1; Edwards, J.) by service of a summons and complaint on September 11, 1989 (copies of the summons and complaint are attached hereto as Exhibit A). Plaintiffs also obtained ex parte an Order to Show Cause whereby defendants are required to show cause

why an order should not be entered enjoining defendants from selling or buying the assets of defendant UCC, UCAC, or UCHC and from paying or receiving any fees in connection with such sale. Plaintiffs' complaint seeks such relief "unless and until such time as a fund is set aside to provide for all unfunded retirement obligations owed to the class." (Plaintiff's Complaint 15.) A copy of plaintiffs' Order to Show Cause and accompanying papers are attached hereto as Exhibit B. (The exhibits to the moving papers are reproduced in the accompanying Appendix to Defendants' Notice of Removal.) The exhibits to this Notice of Removal constitute all of the pleading, process and orders in this action, and constitute the entire record before the State Court.

4. This action is of a civil nature, of which the district courts of the United States have original jurisdiction, and arises under the Laws of the

United States. All of the rights sought to be secured to the plaintiffs by this action including, inter alia, "all unfunded retirement obligations owed to the class" (Complaint at 15), relate to an employee benefit plan and therefore fall under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq. Jurisdiction is therefore appropriate pursuant to 28 U.S.C. § 1331. See, e.g., Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987).

WHEREFORE, the defendants remove this action to the United States District Court for the Southern District of New York.

Dated: New York, New York
September 13, 1989

Yours etc.,

CAHILL GORDON & REINDEL
(a partnership including
professional corporations)

By:_____
A Member of the Firm

80 Pine Street
New York, New York 10005
(212) 701-3000

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Robert J. Mazaika, as
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Drexel Burnham Lambert
Incorporated

DEWEY, BALLANTINE, BUSHBY,
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Peter May, as Officers and
Directors, Uniroyal Chemical
Holding Company, Uniroyal
Chemical Acquisition Co., and
Uniroyal Chemical Co., Inc.

To: Clerk of Court
United States District
Court for the Southern
District of New York
United States Courthouse
Foley Square, New York 10007

Sipser, Weinstock, Harper & Dorn
380 Madison Avenue
New York, New York 10017

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006-1880

October 6, 1989

BY HAND-DELIVERY

Honorable Leonard B. Sand
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Albert, et al. v. Avery, et al.
Civil Action No. 89 CIV 6083 (LBS)

Dear Judge Sand:

The Pension Benefit Guaranty Corporation ("PBGC") is a wholly-owned United States Government Corporation established under Section 4002 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1302, to administer the pension plan termination insurance program created by Title IV of ERISA. The agency is responsible for coverage of nearly 40 million plan participants.

The PBGC first learned of this action (and the underlying issues) on September 19, 1989, when counsel for plaintiffs informed this office that defendants had argued that Congress intended that the PBGC's scrutiny of transactions such as those involved in this case and the remedies afforded to the PBGC serve as a substitute for actions brought by pension

plan participants.[1] On September 29, 1989, the Court granted the PBGC's request for an opportunity to submit its views by October 6, 1989, since the closing of the transaction was scheduled on or about October 13, 1989. We appreciate the Court's having given us this opportunity.

We have reviewed pleadings and affidavits supplied by the parties, and have afforded both plaintiffs and defendants an opportunity to present their positions to the agency. However, in view of the breadth of the issues involved in this case and the limited time for review, the PBGC has decided to take no position as to the merits of this case. Nonetheless, the agency would like to take the opportunity to address erroneous contentions as to the PBGC's role under Title IV.

First, it would be simply impossible for the PBGC to police generally the sale of businesses such as the one

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[1]Defendants asserted that:

> "[t]he PBGC's statutory role in overseeing the funded status of pension plans under Title IV of ERISA -- including the plan termination insurance scheme under which most of these plaintiffs' pension benefits are guaranteed by the PBGC -- provides sufficient protection of plaintiffs' pension benefits . . . [U]nder ERISA's statutory scheme, the PBGC is equipped to protect pension plan participants from the possible harm plaintiffs in this case say they fear if and when the harm occurs or the PBGC believes the harm will occur." Defendants' Joint Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 51-54.

involved in this case. Indeed, as described above, the agency did not even learn of this transaction until plaintiffs' counsel contacted this office. The PBGC has limited resources, with a total staff of approximately 550, all in Washington, D.C., and the responsibilities, among others, of determining and paying the benefits to participants or beneficiaries in plans which have terminated, and attempting to recover liabilities from responsible companies and individuals. Thus, even attempting to monitor transactions like this nationwide in sufficient depth would not be feasible.[2] Moreover, enforcement actions involve complex factual issues entailing time-consuming and expensive proofs, and, in any event, would not generally be brought until "after the horse is out of the barn." (Transcript at p. 18, September 18, 1989.)

Second, a pre-termination enforcement tool available to protect the Title IV program administered by the PBGC is an action to terminate a plan pursuant to 29 U.S.C. § 1342. However, termination of their pension plan is something that the plaintiffs are apparently trying to avoid by bringing this suit. Indeed, termination of the plan would mean that participants cease to accrue or vest in pension benefits.

Third, the PBGC guarantees benefits of terminated, insufficient defined benefit (not welfare) plans. 29 U.S.C. § 1321. There are, in addition, limitations to the guaranty that may reduce or eliminate a participant's receipt of benefits which he or she worked for and earned according to the terms of the pension plan. Under 29 U.S.C. § 1322, accrued but nonvested

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[2] The statute does not require notification to the PBGC of potentially problematic transactions until 30 days after the transaction occurs. 29 U.S.C. § 1343.

benefits are not guaranteed. New benefits or benefit improvements which have not been in effect for five years are guaranteed only at a rate of 20% (or $20 per month, whichever is greater) for each year the benefit improvement has been in effect. Benefits in excess of $2028 per month are not guaranteed. And benefits which vest by virtue of a plan termination are not guaranteed at all. In sum, the protection afforded by the PBGC is clearly not a substitute for a viable company funding its plans.

Thank you for your consideration.

Very truly yours,

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cc: all counsel